IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CALVIN HORATIO DUNBAR	)	
	)	
v.	)	CIVIL ACTION
	)	
M. FRANCES HOLMES,	)	
ACTING DISTRICT DIRECTOR,	)	No. 00-1946
U.S. IMMIGRATION &	)	
NATURALIZATION SERVICE	)	

MEMORANDUM

Padova, J. **November , 2000**

This matter arises on Petitioner, Calvin Dunbar's Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2241, challenging his detention by the Immigration and Naturalization Service ("INS") pending. The Government filed a Response, and Petitioner submitted a supplemental Reply.[1] The matter is fully briefed and ripe for decision. For the reasons that follow, the Court denies the Petition.

I. Background

Petitioner Calvin Dunbar is a citizen of Jamaica. (Pet. at 2; Resp. at 1.) He came to the United States in the early 1970s, and on November 14, 1988, was accorded "Conditional Permanent Resident Status,"[2] pursuant to 8 U.S.C. § 1186a. (Id.)

On August 6, 1996, Petitioner was arrested in Newburgh, New York, for attempted sale of a controlled substance (cocaine). On April 3, 1998, pursuant to a plea agreement, Petitioner

[1]Petitioner's Reply is captioned "Petitioner's Response to the Respondent Order to Show Cause." All references to Petitioner's Reply are to that document.

[2]Section 1186a of Title 8 of the United States Code provides conditional permanent resident status for certain alien spouses and sons and daughters.

was sentenced to two to eight years incarceration. While serving his sentence in a New York State prison, the INS commenced removal (deportation) proceedings. Petitioner was released to the custody of the INS in June 1999, and subsequently ordered removed on July 1, 1999. Petitioner does not challenge the deportation order. (Pet. at 2.)

Since the issuance of the final order of removal, Petitioner has been detained in Berks County Prison awaiting deportation. According to the custody review completed in December 1999, Dunbar had been "presented" to the Jamaican Consulate in New York for issuance of a travel document in July 1999, but the document has not yet been issued. (Resp. Ex. B at 1.) The INS also concluded, in the custody review, that Dunbar should be kept in detention. (Id. at 6.) In a subsequent review held on July 7, 2000, the INS again concluded that he should be kept in detention pending final removal. (Resp. Ex. C at 5; Reply Ex. at 1.[3])

II. Discussion

Detention, release, and removal of aliens who have been issued final deportation orders is governed by the provisions of 8 U.S.C. § 1231. Section 1231(a) requires that the subject alien be removed within a period of 90 days from the date of the order becomes final. 8 U.S.C.A. § 1231(a) (1999). During this initial 90-day period, detention of the alien is mandatory. Id. After the conclusion of the 90-day period, the alien may be held in continued detention pursuant to 8 U.S.C. § 1231(a)(6). Alternatively, the INS may release the individual under continued supervision, pursuant to the provisions of 8 U.S.C. § 1231(a)(3). The INS has elected to retain Petitioner in detention pending final deportation.

[3]The INS Preliminary Decision letter, dated September 17, 2000, is not specifically marked as an exhibit, but is attached to the back of Petitioner's Reply.

Petitioner does not challenge the removal order. In fact, he notes in his petition that he never challenged the deportation decision, and hoped that in doing so, his deportation to Jamaica would be expedited. (Pet. at 2.) Instead, he challenges his detention, while he is awaiting deportation, as a violation of his substantive due process rights. (Pet. at 3.)

A. Constitutionality of Prolonged Detention

The Third Circuit Court of Appeals addressed the issue of prolonged detention in Chi Thon Ngo v. INS, 192 F.3d 390 (3d Cir. 1997). In that case, the court concluded that there was no constitutional bar to detaining excludable aliens with criminal records for lengthy periods, when removal is beyond the control of the INS and: (1) there is a possibility of his eventual departure; (2) there are adequate and reasonable provisions for the grant of parole; and (3) detention is necessary to prevent a risk of flight or a threat to the community. Id. at 397.

The Third Circuit explicitly limited its holding, however, to excludable aliens and declined to comment on the decision's extension to a similar situation involving deportable aliens. Id. at 398 n.7. Petitioner, who has resided in the United States for nearly three decades and who therefore has been physically present in the United States, is a deportable alien. See Leng May Ma v. Barber, 357 U.S. 185, 187 (1958).[4] Thus, the Court must examine whether Mr. Dunbar's continued custody is governed by the rules articulated in Chi Thon Ngo.

Though the Third Circuit has not ruled on whether prolonged detention is permissible

[4]The distinction between excludable and deportable aliens arises from statutory law in place prior to the 1996 amendments to the immigration statutes, and depends on whether the alien has made successful entry into the United States, regardless of whether the entry was legal or illegal. Id. at 187. An excludable alien is an alien at the border who seeks entry into the United States. Gisbert v. U.S. Attorney General, 988 F.2d 1437, 1440 (5th Cir. 1993). A deportable alien is one who is in the United States past the point of entry and physically present in the country. Id.

with respect to deportable aliens, the Fifth and Tenth Circuit Courts of Appeals have concluded that deportable aliens have no greater rights than excludable aliens in these circumstances, and that prolonged detention beyond the statutory period does not violate due process rights. See Ho v. Greene, 204 F.3d 1045, 1059 (10th Cir. 2000) ("[O]nce an alien who was formerly a lawful permanent resident seeks temporary re-entry into the United States, the alien possesses identical constitutional rights with respect to his application for admission as an excludable alien."); Zadvydas v. Underdown, 185 F.3d 279, 297 (5th Cir. 1999) ("Once the decision is made to deport a resident alien, then, there is little, if any, difference in the government's interest in effectuating deportation of a resident alien and expulsion of an excludable alien."), cert. granted, No. 99-7791, 2000 WL 38879 (Oct. 10, 2000). Similarly, federal district courts in this circuit have determined more particularly that the rule in Chi Thon Ngo should apply to deportable aliens. See Michel v. INS, CV-99-1879, 2000 WL 1656282, at *13 (M.D. Pa. Nov. 3, 2000) ("The reasoning of Chi Thon Ngo . . . applies in cases involving deportable aliens subject to a final order of removal."); Martinez v. INS, 97 F. Supp. 2d 647, 650 (M.D. Pa. 2000) ("[W]e conclude that deportable aliens have no greater constitutional rights in this context than excludable aliens."); but see Kay v. Reno, 94 F. Supp. 2d, 546, 553 (M.D. Pa. 2000) ("The court . . . does not agree that excludable aliens and deportable aliens are equal for the purposes of the Due Process Clause of the Fifth Amendment.")

The Court finds the rationale and conclusion of the Fifth and Tenth Circuits persuasive. Though there are differences in due process rights as between excludable and deportable aliens, those differences disappear once a final order of deportation is entered. Zadvydas, 185 F.3d at 296. The reason for this is that the national interest in effectuating deportation is identical,

regardless of the former status of the alien prior to deportation. Id. The effect of the final removal order is to strip the petitioner of any heightened constitutional status he might have possessed prior to entry of the final removal order. Ho, 204 F.3d at 1059. Like an alien seeking initial entry into the country, the petitioner whose removal has been ordered has no right to be at large in the United States. Id. The deportable alien and the excludable alien are thus in an identical position once the final removal order has been issued.

Several district courts have rejected this reasoning and held that there is a difference between deportable and excludable aliens with respect to due process rights as they relate to detention once removal has been ordered. See, e.g., Phan v. Reno, 56 F. Supp. 2d 1149, 1154 (W.D. Wash. 1999) ("Petitioners are deportable-not-excludable-aliens, and this distinction is critical."). In Kay v. Reno, 94 F. Supp. 2d 546 (M.D. Pa. 2000), the court held that in the detention context, deportable aliens are entitled to greater substantive due process than excludable aliens. The court observed that, "Once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." Id. at 553 (citing Landon v. Plasencia, 459 U.S. 21, 32 (1982)).

The Court declines to follow the reasoning dispositive to the Phan and Kay decisions. These decisions relied on the idea that an alien who has lived in this country for an extended period of time will have established ties that should not be taken away lightly. Michel, 2000 WL 1656282, at *11. However, the consequence of these ties is that a deportable alien has heightened rights in the deportation hearing process, as compared to excludable aliens. Once a final order of removal has been issued, this effectively revokes the resident alien's right to participate in society, and those ties no longer take on any significance. Id. at *12.

Furthermore, Kay and Phan also rely on the notion that because the alien's home country has refused to accept the alien, the government's interest in detention is weak, if not nonexistent. Kay, 94 F. Supp. 2d 546, 551;Phan , 56 F. Supp. 2d at 1156. In Kay, for example, the court noted that the United States did not have a repatriation agreement with Cambodia, and there was no evidence that the INS had even requested travel documents for Petitioner. Id. at 553. However, factually, the case at bar is substantially different. The INS has made a formal request to Jamaica for travel documents for Petitioner. Furthermore, Petitioner's native country of Jamaica has historically accepted repatriation of criminal aliens. (Resp. at 8.) Based on these facts, the Court cannot conclude that there is little or no likelihood of deportation in the foreseeable future.[5]

The Court concludes that the rules articulated in Chi Thon Ngo and Michel apply to this case. Accordingly, the Court holds that there is no constitutional bar to Petitioner's continued detention, provided he continues to receive a thorough review for parole, including a thorough review of his risk of flight and/or threat to the community. See Michel, 2000 WL 1656282, at *13. The Court will next consider sufficiency of Petitioner's INS reviews to date.

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[5]Similarly, in Chi Thon Ngo, the court concluded that it was extremely unlikely that petitioner's detention would be permanent, despite the fact that diplomatic efforts to effect the deportation to Vietnam were moving "at a speed approximating the flow of cold molasses." Chi Thon Ngo, 192 F.3d at 398.

Just as there is a distinction between Mr. Dunbar's prospects for final removal and prospects in Phan and Kay, so too does there appear to be such a distinction as between Mr. Dunbar and petitioner in Chi Thon Ngo, where the petitioner's native country initially refused to accept petitioner. However, because the court in Chi Thon Ngo ultimately concluded that there was still the possibility of petitioner's eventual departure, the distinction is not significant.

B. Sufficiency of INS Parole Reviews

The Court must next examine the INS reviews to ensure that they satisfy Third Circuit rules and Petitioner's due process rights. The Court concludes that the INS has, so far, complied with the necessary requirements to satisfy due process. There must be adequate and reasonable provisions for the grant of parole. Chi Thon Ngo, 192 F.3d at 397. The reviews must reflect an assessment of the risk of flight and danger to the community on a current basis; perfunctory reviews based solely on repeated readings of the file are not sufficient. Id. at 398. So long as the reviews are searching and periodic, the prospect of indefinite detention without hope for parole will be eliminated, and due process will be satisfied. Id. at 399. Here, Petitioner has received several periodic reviews. These reviews have been based on interviews of Petitioner, an analysis of current community ties, and other information provided through other investigation. (See June 22, 2000 review, at 4.) In the most recent denial of parole, the INS noted that it also considered Petitioner's recent behavior record while incarcerated. (Reply Ex. at 1.) The Court thus concludes that the INS has provided Petitioner with reviews that adequately and reasonably provide for the possibility of parole and that therefore eliminate the prospect of indefinite detention without the hope of parole.

III. Conclusion

For the reasons stated, the Court concludes that the reasoning of Chi Thon Ngo applies in this case involving a deportable alien subject to a final order of removal. Petitioner's substantive due process rights are not violated by his continued detention in excess of the 90-day statutory period, and the INS has thus far fulfilled its obligations in carrying out the parole reviews sufficient to satisfy Petitioner's due process rights.

An appropriate Order follows.

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O R D E R

AND NOW, this day of November, 2000, upon consideration of Petitioner Calvin Horatio Dunbar's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. No. 1), the Government's Response (Doc. No. 3), and Petitioner's Response to the Respondent Order to Show Cause (Doc. No. 4), **IT IS HEREBY ORDERED** as follows:

1. The Petition for a Writ of Habeas Corpus is **DENIED**;

2. The Clerk is directed to **CLOSE** the file.

BY THE COURT:

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John R. Padova, J.